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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-813

AMERICAN COMMERCIAL LINES, INC.,
Petitioner,

v.

THOMAS W. GRIFFITH and
WHEELING-PITTSBURGH STEEL CORPORATION,
Respondents.

RESPONDENT THOMAS W. GRIFFITH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counter-Statement of the Question Presented

Should this Court review an opinion of the Court of Appeals that follows a previous decision rendered by this Court, and that is consistent with the legislative intent of the statute involved, and with the decisions of other Courts of Appeals?

Counter-Statement of the Case

On May 26, 1973, Respondent Thomas Griffith was thrown into the hold of a barge and seriously injured. The barge was owned by American Commercial Lines, Inc., and had been dispatched to Wheeling-Pittsburgh Steel Company, the Respondent's employer. The injury occurred because the rails upon which the barge covers rode were bent, and as a consequence, the covers did not roll freely; instead, they had to be forced closed with the use of cables attached to a crane.[1]

The barge supplied by the vessel owner, American Commercial Lines, Inc., to Wheeling-Pittsburgh Steel Corporation, contained numerous imperfections. The record supports the Trial Court's conclusion that the covers on the barge could not be closed because of any or all of the following conditions: a bent railing (129a-130a, 383a, 391a-392a), rusted cover wheels (165a, 205a, 301a, 370a), debris between the tracks (205a), missing and bent side locks (205a, 227a), a cover wheel which was off the track (235a), and a brownish rock called "spar" that clogged the channels in which the cover wheels rolled (305a-306a, 369a-370a). None of these conditions were caused by Wheeling-Pittsburgh Steel Corporation after receipt of the barge (453a); accordingly, they were present in the barge when possessed by the barge's owner, American Commercial Lines, Inc., and before its dispatch to Wheeling-Pittsburgh Steel Corporation.

Before sending the barge to Wheeling-Pittsburgh Steel Corporation, it was inspected by Franklin Merritt, an employee of American Commercial Lines, Inc., at their terminal at Glen Willard, Pennsylvania. His inspection consisted of

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[1] Wheeling-Pittsburgh Steel Corporation's answers to interrogatories Nos. 11, 34, 38, 39 and 41 from American Commercial Lines, Inc.

walking around the perimeter of the barge; he did not make an operating inspection of the covers to determine their condition or how they operated. Since the covers were closed at the time of his inspection, and he did not attempt to open them or to operate them, he failed to ascertain the condition of the rails or the wheels on which the covers move before the barge was dispatched to Wheeling-Pittsburgh Steel Corporation (12a, 17a, 21a-23a).

At the time that Franklin Merritt made this perfunctory inspection on behalf of American Commercial Lines, Inc., he was well aware that Wheeling-Pittsburgh Steel Corporation, when confronted by sticking barge covers, attempted to move the covers by using a double sling assembly, as was being done at the time of the accident, and had followed this practice for many years. American Commercial Lines, Inc. had never advised Wheeling-Pittsburgh Steel Corporation that this was an improper procedure, in spite of Merritt's knowledge (41a, 145a).

During the process of attempting to close the covers on the barge, the employees of Wheeling-Pittsburgh Steel Corporation found that they could not close the fifth cover by simply pulling it with the crane, in the normal manner in which covers are to move. Only after the employees of Wheeling-Pittsburgh Steel Corporation had utilized the eyelets on the edges of the covers, and had failed to budge the stuck cover, did they resort to the double sling method of closing it. This entailed attaching single cables to cover three and cover five, in the center, where the employees hoped they could get a better purchase on the covers. Because of the absence of eyelets in the center of the covers, Respondent Thomas Griffith had to remain on cover three to assure that the cable held on the rim of the cover, as the crane pulled the

cables taut. When the cover suddenly pulled loose and then flipped upwards in the air, Griffith was propelled into the hold and injured.

The trial testimony indicated that the next step in moving the unyielding covers, if the double sling method failed, would have been for the employees of the steel company to lift off the covers. This would have required that each cover be lifted off the barge by using the crane; since the covers weigh slightly less than ten thousand pounds, this procedure was time-consuming and considered a last resort (326a, 328a-329a). American Commercial Lines, Inc. had never recommended this procedure to the steel company before the accident (145a).

REASONS FOR DENYING THE WRIT

The Decision of the Court of Appeals Was Consistent With a Previous Opinion of this Court, With the Express Congressional Intent Underlying the Amended Longshoremen's and Harbor Workers' Compensation Act, and With the Decisions of Other Courts of Appeals.

The Petitioner has urged this Court to issue a writ ostensibly because of a conflict between the Court of Appeals' opinion and decisions rendered by other Courts of Appeals. A careful analysis of the opinion of the Third Circuit, however, demonstrates that it faithfully follows the decision of this Court in *Kermarec v. Compagine Generale Transatlantique*, 358 U.S. 625 (1959), and is consistent with the express Congressional intent underlying the Amendments to the Longshoremen's and Harbor Workers' Compensation Act, as well as the decisions cited by the Petitioner in its brief.

Since negligence is not defined by the Act, the Court of Appeals adopted a standard of reasonable care under the circumstances of each case. In explicating this standard, the Court said:

> "At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel know of or by the exercise of reasonable care could have discovered the condition on board ships that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against the damage. . . ." (App.A-14a)

In addition, the Court reaffirmed its position enumerated in previous decisions that:

> "The vessel has no general duty continually to supervise the activities of the stevedore, to assume responsibility for the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore during the course of its operations (at least when the vessel has no knowledge of the dangerous conditions)." (App.A-11a)

Employing this standard, the Court of Appeals found that the record revealed a clear breach of duty by the shipowner, Petitioner American Commercial Lines, Inc., in providing a glaringly deficient vessel that caused Respondent's accident.

The adoption by the Court of Appeals of this standard was faithful to the illuminating decision by this Court in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In that case, Justice Stewart, speaking for the majority, eschewed the adoption of the mechanical distinctions between licensees

and invitees developed by the medieval law courts of England, refusing the import these subtle distinctions into the laws of admiralty. Instead, he opted for a more flexible test of negligence, imposing a uniform standard on shipowners of exercising reasonable care under the circumstances. In doing so, he said:

> It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew. . . . We hold that the owner of a ship in navigable waters owes to all who are onboard for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." 358 U.S. at 630.

In addition to conforming to the injunction laid down by this Court in *Kermarec*, the opinion by the Court of Appeals was faithful to, and consistent with, the wishes of the authors of the Amendments to the Longshoremen's and Harbor Workers' Compensation Act of 1977. As expressed in the House Report on that statute:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." (3 U.S. Code Congressional and Administrative News, 92nd Cong. 2d Sess., 1972, p. 4704.)

Finally, a careful reading of the decision of the United States Court of Appeals for the Third Circuit, and particularly the factual matrix that supports that opinion, easily distinguishes it from the cases cited in the Petitioner's brief,

and reveals that the inconsistency claimed by the Petitioner is a fanciful product of the Petitioner's imagination.

To verify this, it is instructive to discern first what was not involved in the decision sought to be reviewed. The Court below was *not* dealing with a deficiency or a hazardous activity created by the stevedore working on the vessel. It was squarely faced with the problem of responsibility for admitted deficiencies in a vessel owned by the Petitioner, present while the vessel was in the possession of the Petitioner, and productive of the injuries sustained by the Respondent. This factual disparity represents a significant difference between the present case and the cases cited by Petitioner, and claimed to create an inconsistency between the various Courts of Appeals.

Close examination of the cases cited by the Petitioner makes clear their differentiation from the present case, and the fact that they would have been decided the same way employing the legal test used by the Third Circuit Court of Appeals, if their factual setting had been presented to that Court. Three of the cases cited by the Petitioner involve claims by longshoremen who were injured solely because of the negligence of their employer, the stevedore. For example, in *Chavis v. Finnlines Ltd., O/Y*, 576 F.2d 1072 (4th Cir. 1978), a verdict for the defendant was affirmed, on the grounds that the "stevedore created the alleged defect." 576 F.2d at 1079. Likewise, in *Munoz v. Flota Merchante Grand Combiana, S.A.*, 553 F.2d 837 (2d Cir. 1977), affirmance of a defendant's verdict was based on the fact that the stevedore "stowed the cargo in such a manner as to create a latent, dangerous condition upon which one of its employees was injured." 553 F.2d at 840. Finally, in *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977), one longshoremen was

overcome by fumes caused by a defective blower provided by his employer, the stevedore, while the other plaintiff longshoreman was struck by a load dropped from a boom operated by the stevedore. Verdicts for the vessel were affirmed, since it was "clear that the vessel has no liability under section 905(b) since the sole cause of injury was the negligence of the stevedore." 546 F.2d at 1240.

The three cases discussed above are cited by the Petitioner as cases that create a conflict between the various Courts of Appeals. However, by referring back to the standards quoted from the opinion of the Third Circuit Court of Appeals, it is obvious that the Court would have arrived at the same result as the cited decision, using its test for negligence, and that the previous decisions by the Third Circuit Court of Appeals in *Brown v. Ivarans*, 545 F.2d 854 (3d Cir. 1976), *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977), and *Rich v. United States Lines*, 596 F.2d 541 (3d Cir. 1979), bring that Circuit squarely into line with the cases cited by Petitioner.

The remaining case cited by the Petitioner, *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir. 1978), underscores the common ground on which all of these cases stand, rather than pointing up an inconsistency between the Courts of Appeals' opinions. In *Canizzo*, a verdict for the longshoreman was affirmed, on the basis of proof that the shipowner should have known of the presence of the grease that caused the longshoreman's fall. On facts similar to the present case, the Court adopted a rationale for affirming the verdict that virtually echoes the standard adopted in the present case. It said:

> "A shipowner, however, can only be liable under 343A if he knows or should have known of the obviously dangerous, but unavoidable condition."

Thus, the factual background, the result of the trial and appeal, and the legal test for negligence employed in that case virtually duplicates the instant case.

In summary, the opinion of the Court of Appeals shows a faithful adherence to the precepts set down by this Court in *Kermarec*, and to the goals of the authors of the Act. It varies from the opinions produced by several other Courts of Appeals only because of the different factual setting confronting the Court, and it implicitly indicates that the Court, if confronted by the facts posed by the cases cited as inconsistent, would have settled on the same result reached in those cases. Thus, the petition filed here represents, when reduced to its essentials, an invitation to this Court to enter a factual thicket that is of no great national importance, and is of concern only to the parties to this immediate litigation. There is no compelling reason why this Court, already facing the exigencies of deciding cases national in scope and interest, should undertake to review factual findings by a lower court, or to decide a case that when reduced to its basics, involves nothing more than the issue of the quantum of proof necessary to sustain a longshoreman's claim.

Conclusion

The present case is an ordinary garden-variety negligence action, posing the basic issue of the extent of proof necessary to sustain a longshoreman's claim. The opinion of the Court of Appeals follows the law of this Court and conforms to the intent of the legislation involved. Except for factual differences, it does not depart from the decisions of other Courts of Appeals. No issue of great moment or of overriding national importance is presented by the case, and only the present litigants have an interest in its outcome. For all these reasons, the Writ of Certiorari should not issue.

Respectfully submitted,

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